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No. 07-544

In the Supreme Court of the United States

CHRIS CHRONES, WARDEN, *Petitioner,*

v.

MICHAEL ROBERT PULIDO, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S BRIEF ON THE MERITS

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QUESTION PRESENTED

Stromberg v. *California*, 283 U.S. 359 (1931), required the reversal of the judgment if a general verdict could have rested on an instruction that defined a constitutionally defective alternative theory of criminal liability. However, a modern line of cases, including *Neder* v. *United States*, 527 U.S. 1 (1999), establishes that error in instructing on an element of a charged crime is not "structural error," so as to require automatic reversal, but is instead "trial error" and, as such, may be harmless.

The question presented is:

Did the Ninth Circuit fail to conform to "clearly established" Supreme Court law, as required by 28 U.S.C. § 2254(d), when it granted habeas corpus relief by deeming an erroneous instruction on one of two alternative theories of guilt to be "structural error" requiring reversal because the jury might have relied on it?

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OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 487 F.3d 669 (9th Cir. 2007) and is reproduced in the appendix to the petition for writ of certiorari. Pet.App. 1a. The opinion of the United States District Court is reproduced in that appendix as well. Pet. App. 32a. The opinion of the California Supreme Court is reported at 15 Cal. 4th 713, 936 P.2d 1235 (1997), and reproduced in the appendix to the petition. Pet. App. 101a.

JURISDICTION

The court of appeals issued its decision on May 30, 2007. Pet. App. 1a. It denied petitioner's timely petition for rehearing and rehearing en banc on July 18, 2007. Pet. App. 31a. This Court has jurisdiction under 28 U.S.C. § 1254(1) and Supreme Court Rule 13.3.

RELEVANT STATUTORY PROVISIONS

Section 2254(d)(1) of Title 28 of the United States Code provides: "An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—[¶] resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." Pub. L. No. 104-132, Title I, § 104, 110 Stat. 1218 (1996).

STATEMENT OF THE CASE

1. A jury convicted respondent of first-degree murder, Cal. Penal Code § 187(a); robbery, Cal. Penal Code § 211; and two car thefts unrelated to the other crimes. The jury also found, as a "special circumstance," that respondent committed the murder in the course of robbery, Cal. Penal Code § 190.2(a)(17)(A). J.A. 55-57; CT 657-59. The jury deadlocked on allegations that respondent personally used a gun, Cal. Penal Code § 12022.5(a), and personally inflicted great bodily injury, Cal. Penal Code § 1203.075, in committing the murder and robbery. CT 360-61. Respondent was sentenced to life imprisonment without possibility of parole. CT 735.

The state supreme court summarized the trial evidence:

> Sometime between 1 a.m. and 5:30 a.m. on May 24, 1992, Ramon Flores, the cashier at a Shell gas station in San Mateo, was shot in the head with a single .45-caliber bullet, killing him within seconds. A neighbor heard a loud bang coming from the direction of the gas station around 3:45 a.m., then a voice yelling; he could not distinguish words, but told a police detective it sounded like the person was addressing someone else.

A cash register taken from the store was found the next morning in some roadside bushes elsewhere in San Mateo. Defendant's fingerprints were on the cash register, as well as on an unopened can of Coke found on the store counter. No fingerprints of Michael Aragon, who defendant testified committed the killing, were identified on either the can or the register.

Arrested on an unrelated auto theft charge, defendant volunteered that he had information about the Shell station robbery. He led police to a location where they found discarded, unused .45-caliber cartridges, which bore ejection markings resembling those on a cartridge found on the gas station floor. Defendant made a series of inconsistent exculpatory statements to police, blaming the robbery and killing successively on a man named Carlos Vasquez, on a relative of defendant's named Eduardo Alarcon and, finally, on an unidentified Tongan man. In a telephone conversation from jail with his uncle, Michael Aragon, and Aragon's cohabitant, Laura Moore, however, defendant said he was alone during the robbery.

At the time of the killing, defendant was staying with Aragon, Moore and their children in their San Mateo home. While he was staying with them, Aragon, two of the children, and a neighbor saw defendant with a pistol, which the neighbor identified as a .45-caliber Colt. During that time, defendant twice observed that the nearby Shell station would be easy to rob because the attendant was always asleep. Aragon told defendant to get rid of the gun because he, Aragon, was on probation. He had been convicted in 1989 of burglary, possession of cocaine and contributing to the delinquency of a minor.

Aragon and Moore testified that defendant was at home when they went to bed around midnight on May 23, but was gone when they got up at around 3 a.m. to

care for their baby. The next morning, Sunday, May 24, they awoke to find defendant asleep in the living room with his clothes and shoes on. He showed Aragon his wallet and said, "Look unc, almost all ones." Later that day, Moore discovered defendant was carrying a handgun and insisted he and Aragon dispose of it. At her direction, defendant took the gun apart; Moore then boiled the pieces in soapy water and put most of them in a bag, which defendant and Aragon threw away near Candlestick Park. Two pieces that Moore had retained to prevent reassembly were later given to police and identified as fitting a .45-caliber Colt.

After seeing a newspaper article about the killing, Aragon asked defendant if he committed it. Defendant denied he had, but a few days later, when Aragon asked again, defendant admitted the crime. He told Aragon he bought a Coke, then shot Flores in the face, took the register and later threw it in some bushes. In a letter from jail, however, defendant wrote to Moore, "If Michael is reading this, tell him I didn't kill that guy, I was just messing with him."

Defendant testified, blaming Aragon for the killing. Aragon, he stated, had seen where defendant kept the pistol. On the night of May 23, defendant and Aragon went out in Aragon's car; defendant thought the pistol was on the shelf where he usually kept it. They went to Hunters Point, where Aragon bought and smoked some cocaine. They left, but returned later for Aragon to buy and smoke more cocaine. Eventually the two arrived at the Shell station in San Mateo. Aragon went inside, defendant thought for matches or cigarettes. Defendant waited outside. He heard a gunshot and ran into the store. Aragon was holding defendant's gun. Flores was lying on the floor, bleeding from a large bullet wound in his face.

> Defendant yelled at his uncle, ran out of the store and got in the passenger seat of the car. A few seconds later, Aragon came out, holding the cash register in his left hand and the gun in his right hand. He threw the register on defendant's lap and drove away.
>
> As they were driving away from the scene, Aragon told defendant to open the register. When defendant did not comply, Aragon pointed the gun at him and insisted. Defendant got a screwdriver from the back of the car and pried the register open. At Aragon's command defendant gave him the money and dumped the register in some bushes by the side of the road. Defendant denied touching a Coke can in the store that night; he suggested he might have touched the can on some earlier occasion when he bought a drink at the store.
>
> The defense also presented evidence casting doubt on Aragon's credibility. While admitting a prior drug possession conviction, Aragon denied he was still using cocaine at the time of the killing. However, Aragon's sister (defendant's aunt) testified he came to her house on Sunday, May 24 or Monday, May 25, at which time he was "on something," but did not smell of alcohol. Her son described Aragon as acting paranoid and smelling of crack cocaine. The sister opined Aragon was a liar and a thief. A police detective testified that, when first interviewed, Aragon said he had gotten up at 12:15 a.m. Sunday to take care of the baby. When Aragon and Moore were later interviewed together at the police station, both said it was around 3 a.m. During a discussion about the time period in which the killing occurred, Aragon said to Moore, "That's when I was with you, remember?"

Pet. App. 102a-105a.

The prosecutor argued to the jury that respondent acted alone, RT 1684; see RT 1665-66 ("Michael Aragon was not

there"), but that respondent was guilty of felony murder whether he was the shooter or an aider and abettor. RT 1658-59, 1718. Defense counsel argued that respondent was only an accessory because he helped Aragon dispose of evidence after the robbery. RT 1710-11.

2. In his state appeal, respondent contended that the trial court erred by failing to instruct the jury that he was not liable for murder as an accomplice if he formed the intent to aid and abet the robbery only after Flores was killed. Pet. App. 105a. Resolving a conflict in California decisions, the California Supreme Court held that an accomplice is not guilty of felony murder if he joins a robbery only after a killing occurs in the commission of the robbery. Pet. App. 101a-102a, 105a-106a, 110a, 115a. The state supreme court's opinion described ambiguity on this "late joiner" or "contemporaneity" issue in two principal instructions given to the jury in respondent's case, CALJIC No. 8.27 (J.A. 11) and CALJIC No. 9.40.1 (J.A. 21):

> Unmodified, CALJIC No. 8.27 appears to tell the jury that an aider and abettor in an enumerated felony . . . is liable for first degree murder in a killing committed by anyone else engaged in the felony. In combination with the . . . instruction concerning the duration of a robbery (CALJIC No. 9.40.1), CALJIC No. 8.27 could well suggest to a jury that a person who aids and abets only in the asportation phase of robbery, after the killing is complete, is nonetheless guilty of first degree murder under the felony-murder rule.

Pet. App. 118a-119a.

The state court did not decide if the instructions were erroneous in respondent's case. Citing the jury's separate special-circumstance verdict, the court concluded that "the omitted issue was resolved adversely to defendant under other, properly given instructions." Pet. App. 102a, 120a. The court explained:

[T]he jury was instructed that the robbery-murder

special-circumstance allegation could not be found true unless defendant was engaged in the robbery *at the time of the killing*. In a modified form of CALJIC No. 8.80.1 . . . the jury was directed to determine whether or not "the murder was committed *while the defendant was engaged or was an accomplice in*" robbery, attempted robbery or the immediate flight from robbery. (Italics added.)[1/] In the special

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1. CALJIC No. 8.80.1 stated in pertinent part:

If you find the defendant in this case guilty of murder of the first degree, you must then determine if the following special circumstance is true or not true: that the murder was committed while the defendant was engaged in or was an accomplice in the commission of, attempted commission of, or the immediate flight after committing or attempting to commit robbery.

. . .

If you are satisfied beyond a reasonable doubt that the defendant actually killed a human being, you need not find that the defendant intended to kill in order to find the special circumstances [*sic*] to be true.

If you find that a defendant was not the actual killer of a human being, or if you are unable to decide whether the defendant was the actual killer or an aider and abettor, you cannot find the special circumstance to be true unless you are satisfied beyond a reasonable doubt that the defendant with the intent to kill aided, abetted, counseled, commanded, induced, solicited, requested, or assisted any actor in the commission of the murder in the first degree, or with reckless indifference to human life and as a major participant, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted in the commission of the crime of robbery (Penal Code, s. 190, 2(1) (17) crime) [*sic*] which resulted in the death of a human being, namely Ramon Flores.

In order to find a special circumstance

> circumstance verdict, consistently with this instruction, the jury found "that the said defendant . . . engaged in or was an accomplice in the commission of or attempted commission of robbery *during the commission of crime charged in count 1* [murder]." (Italics added.) By its special circumstance verdict the jury thus found—explicitly, unanimously and necessarily—that defendant's involvement in the robbery, whether as direct perpetrator or as aider and abettor, commenced before or during the killing of Flores.

Pet. App. 116a (bracketed footnote added). See also J.A. 56-57, CT 658-59.

The court unanimously affirmed the judgment of conviction. Pet. App. 102a, 120a.

3. Respondent sought federal habeas corpus relief under 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act (AEDPA). J.A. 1. In 2005, the district court granted the writ. Pet. App. 32a, 97a. It held that the trial court's failure to instruct on the late-joiner aspect of accomplice liability for felony murder was federal constitutional error. Pet. App. 51a. The district court next found that the state supreme court's conclusion of harmless error was contrary to *Chapman* v. *California*, 386 U.S. 18 (1967), and objectively unreasonable. Pet. App. 52a-67a. Although the state court relied on the special-circumstance verdict as explicit proof that the jury indeed found that respondent had participated in the robbery prior to or during the homicide, the district judge concluded that a typographical error in one of the special-circumstance instructions, CALJIC No. 8.81.17, made it possible for the

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> alleged in this case to be true or untrue, you must agree unanimously.

J.A. 12-13; CALJIC No. 8.80.1 (1990 New); CT 461-62.

jury to return the special-circumstance verdict without making the finding of contemporaneity.[2/]

The district court disagreed with petitioner's further harmless error argument: that, under CALJIC No. 8.80.1, see *ante*, n. 1, the jury could not have found that respondent acted with reckless indifference to human life and as a major participant in the robbery, as required for the special circumstance, without also having found that he aided the robbery before or during the killing. Pet. App. 57a-59a. The district court concluded that the error in the felony-murder instruction had a substantial and injurious effect on the jury's verdict under *Brecht* v. *Abrahamson*, 507 U.S. 619, 637 (1993). Pet. App. 65a-67a.

4. The court of appeals affirmed the district court judgment in a per curiam opinion. Pet. App. 1a-15a. Focusing on the typographical error in CALJIC No. 8.81.17, the court of appeals rejected the state supreme court's reliance upon the special-circumstance verdict for its harmless error finding. "Paradoxical though it may seem," the panel stated, "the erroneous explanation in

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2. The district court perceived "confusion created when the language of the special circumstance verdict form and the special circumstance instruction are considered together." Pet. App. 56a. Because the trial court substituted "or" for "and" in CALJIC No. 8.81.17 (Pet. App. 8a-9a, n.4), a mistake the California Supreme Court had not detected, the district court found that the jury's finding of the special circumstance reflected either of two predicate findings, rather than both (as required): (1) "the murder was committed while the defendant was engaged in . . . the robbery"; or (2) "the murder was committed in order to carry out or to advance the . . . robbery . . . ." Pet. App. 56a. Focusing on the second possibility, the district court concluded that the special-circumstance verdict did not necessarily represent a jury finding that respondent had joined the robbery before or during the killing. Pet. App. 56a-57a. The mis-worded instruction, the court held, undermined the state supreme court's conclusion that the special-circumstance verdict form showed that the jury had resolved the late-joiner issue. Pet. App. 56a, 63a-64a.

CALJIC 8.81.17 permitted the jury to find the special circumstance that the murder was committed 'while the defendant was engaged in or was an accomplice in' robbery without in fact finding that the acts were contemporaneous." Pet. App. 10a-11a.

The panel applied the circuit precedent of *Lara* v. *Ryan*, 455 F.3d 1080 (9th Cir. 2006), to the late-joiner error in the accomplice-liability theory of the felony murder instructions. Pet. App. 11a. *Lara* held that (a) a jury instruction is structural error if it states two or more theories and one is legally improper, and (b) "'where a reviewing court cannot determine with absolute certainty whether a defendant was convicted under an erroneous theory' reversal is required." Pet. App. 11a (citing *Lara*, 455 F.3d at 1086). The court of appeals explained:

> Here, the jury instructions leave open the possibility that the jury convicted [respondent] on a legally impermissible theory, namely, that [respondent] joined the robbery only after Flores was killed. The typographical error in the contemporaneity instruction relied upon by the California Supreme Court introduces doubt into any inference to be drawn from the jury's finding as to the special circumstance. Because, unlike in *Lara*, we cannot be "absolutely certain" that the jury found that [respondent]'s crime of robbery was committed contemporaneously with the murder, the verdict must be reversed.

Pet. App. 11a-12a. The court of appeals conducted no harmless error analysis under *Brecht* v. *Abrahamson*.

Judge O'Scannlain concurred specially under compulsion of *Lara*, despite his view that the circuit rule's "attempt to distinguish instructions involving impermissible alternative theories from other instructional errors is logically unsustainable and inconsistent with Supreme Court precedent." Pet. App. 15a. In a separate concurrence, Judge Thomas found *Lara*'s structural error rule

dispositive and "firmly grounded in Supreme Court jurisprudence." Pet. App. 15a-16a, 24a. Alternatively, Judge Thomas found reversal to be "the right result even under a harmless error standard." Pet. App. 15a.

Petitioner sought rehearing and rehearing en banc. J.A. 2. Petitioner cited this Court's intervening decision in *Fry* v. *Pliler*, 551 U.S. __, 127 S.Ct. 2321 (2007). J.A. 3. Rehearing was denied. Pet. App. 31a.

SUMMARY OF ARGUMENT

The Ninth Circuit erroneously granted habeas corpus relief on the premise that jury instructions presenting the jury with both a correct and an incorrect theory of guilt are "structural" errors requiring reversal. The panel's decision runs afoul of two habeas corpus principles: the statutory command in 28 U.S.C. § 2254(d)(1) (AEDPA) to review state court decisions deferentially in light of "clearly established Federal law" determined by this Court; and this Court's directive in *Fry* v. *Pliler*, 551 U.S. __, 127 S.Ct. at 2328, to test all trial errors for prejudice under the forgiving "substantial and injurious effect" standard of *Brecht* v. *Abrahamson*, 507 U.S. at 637. The Ninth Circuit's rule that "alternative legal theory error" is "structural error," a rule it derived from *Stromberg* v. *California*, 283 U.S. 359 (1931), is not clearly established law under this Court's modern harmless error precedents. Therefore, the state court did not act "contrary to" this Court's precedents in treating the error as "trial error," which may be harmless, rather than as structural error, which necessarily requires reversal.

1. Unconstitutional instructional error occurred in this case because there was a reasonable likelihood that the jury found respondent guilty of felony murder by using an incorrect theory of accomplice liability—one that did not require the jury to find that respondent had aided and abetted robbery before the killing. Under this Court's

modern jurisprudence, however, most constitutional errors are trial errors subject to traditional harmless error analysis. Instructional errors in the form of improper presumptions, incorrectly described elements, and omitted elements are trial errors. A court is able to review trial error for harmlessness by determining from the record whether the jury would have reached the same verdict in the absence of the error.

Instructions presenting the jury with both correct and incorrect alternative legal theories might be worse than those presenting the jury with "single legal theory error" in the form of the misdescription or omission of an element. The "alternative legal theory error" here was indistinguishable from, and certainly no worse than, misdescribed-element or omitted-element errors this Court has found to be trial error. A reviewing court remains able to judge, in light of the evidence and the jury's findings, whether the error affected the verdict.

In contrast, structural error deprives a reviewing court of any basis in the record from which to determine whether the error was harmless. This Court has identified only two narrow categories of structural instructional error: a defective reasonable doubt instruction and a directed verdict. The error in this case is not remotely comparable to either of those: the record shows a conviction based on a proper definition of beyond a reasonable doubt, and not on a directive from the trial court to convict. The error does not deprive a reviewing court of the ability to conduct a harmless error analysis. Therefore, the California Supreme Court's adjudication of respondent's instructional error claim was not "contrary to" or an "unreasonable application" of this Court's modern cases (beginning with *Rose* v. *Clark*, 478 U.S. 570 (1986)). They recognize that unconstitutional instructions that omit or misdescribe elements of the charged crime remain subject to harmless error review.

2. The Court's modern instructional error cases have also established a doctrinal framework irreconcilable with *Stromberg* and the *Stromberg*-based rule on which the Ninth Circuit relied. When *Stromberg* was decided, seventy-seven years ago, all constitutional error was treated as structural—necessarily prejudicial. Today, the vast majority of constitutional errors are recognized as trial errors—possibly harmless. Review of instructional error has evolved from focusing on the incorrectness of instructions to focusing on the jury's misapplication of instructions, and the concept of prejudice has evolved concomitantly from what the jury *could* have done *with* an incorrect instruction to what the jury *would* have done *without* it.

The Court has never attempted to reconcile *Stromberg* with its modern instructional error cases. At least one modern harmless error case, *Pope* v. *Illinois*, 481 U.S. 497 (1987), conflicts starkly with *Stromberg*. The jury in *Pope* convicted the defendant based on a theory that unconstitutionally criminalized protected speech, yet the error was deemed subject to harmless error analysis. In *Stromberg*, by contrast, the error was reversible simply because the jury might have relied on such a theory.

The Ninth Circuit's *Stromberg*-based rule is inconsistent with the Court's modern cases for the same reasons that *Stromberg* itself is. In *Lara* v. *Ryan*, 455 F.3d at 1085, the Ninth Circuit attempted to reconcile *Stromberg* with this Court's modern harmless error cases. But *Lara* offered only a conclusory assertion that alternative-legal-theory error is structural.

Like *Stromberg* itself, the Ninth Circuit's rule would render this Court's modern harmless error rules incoherent. Because many instructional errors can feasibly be labeled "alternative legal theory error," the Ninth Circuit's rule would illogically transform trial error into structural error. Likewise, the Ninth Circuit's rule

subverts AEDPA's command to review state judgments deferentially under "clearly established" federal law determined only by Supreme Court precedent; and creates a gaping exception to *Fry*'s command to federal habeas courts to apply *Brecht*.

If the Ninth Circuit's rule is this Court's clearly established precedent, state appellate courts will feel constrained to forgo customary harmless error review whenever an instructional error can plausibly be labeled "alternative legal theory error," even though the error in question is functionally indistinguishable from the many instructional errors this Court has found to be trial error only. The result will be more unwarranted reversals of state court judgments.

ARGUMENT

THE STATE SUPREME COURT DID NOT ACT CONTRARY TO THIS COURT'S "CLEARLY ESTABLISHED" LAW BY REVIEWING THE INSTRUCTIONAL ERROR FOR HARMLESSNESS.

Under 28 U.S.C. § 2254(d)(1), a federal habeas court may not grant relief to a state prisoner unless the state court's decision was "contrary to" or "an unreasonable application of, clearly established Federal law, as determined by the Supreme Court." Here, the Ninth Circuit held that a trial court commits structural error (i.e., error not susceptible to harmless error review) by instructing the jury on a legally erroneous alternative theory of guilt and that the conviction must be reversed unless the reviewing court is "absolutely certain" that the jury did not rely on the erroneous theory to convict. Pet. App. 11a (citing *Lara* v. *Ryan*, 455 F.3d 1080). The Ninth Circuit's rule of "alternative legal theory error" derives from *Stromberg* v. *California*, 238 U.S. at 368. See *Lara* v. *Ryan*, 455 F.3d at 1085 (citing *Sandstrom* v. *Montana*, 442 U.S. 510, 526 (1979), which in turn cites

Stromberg).

The Ninth Circuit erred because divergent lines of authority from this Court show that the Ninth Circuit's *Stromberg*-based rule is not "clearly established Federal law" as defined by § 2254(d). See *Wright* v. *Van Patten*, 128 S.Ct. 743, 747 (2008) (per curiam) (when the Court's cases "give no clear answer to the question presented, let alone one in [defendant's] favor, 'it cannot be said that the state court unreasonabl[y] appli[ed] clearly established Federal law.'"); *Mitchell* v. *Esparza*, 540 U.S. 12, 17 (2003) ("A federal court may not overrule a state court for simply holding a view different from its own, when the precedent from this Court is, at best, ambiguous."); *Lockyer* v. *Andrade*, 538 U.S. 63, 72 (2003) (no clearly established rule exists where Supreme Court cases "exhibit a lack of clarity").[3/]

In the older line, beginning with *Stromberg,* the Court automatically reversed judgments when one of multiple possible grounds for conviction was unconstitutional and it was impossible for a reviewing court to tell which ground the jury relied on. In the modern line of cases, culminating with *Neder* v. *United States*, 527 U.S. 1 (1999), the Court has held that most unconstitutional instructional errors,

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3. *Williams* v. *Taylor,* 529 U.S. 362, 380-84, 412, 416 (2000), held that a court deciding under 28 U.S.C. § 2254(d) whether a rule is clearly established makes the same inquiry as in *Teague* v. *Lane*, 389 U.S. 288 (1989), except that the AEDPA court looks only to Supreme Court jurisprudence. Under *Teague*, a rule is not "dictated by precedent" if a survey of the existing legal landscape shows that the rule is "susceptible to debate among reasonable minds." *Butler* v. *McKellar*, 494 U.S. 407, 415 (1990). As shown in the text, *infra*, the divergence of Supreme Court authority on the issue of how to analyze alternative-legal-theory error demonstrates that the correct approach to this issue is a question susceptible to debate among Supreme Court jurists. Thus, the *Stromberg* approach is neither dictated by precedent nor clearly established.

regardless of how they are characterized, can be reviewed for prejudice. As recognized in several circuits, including the Ninth Circuit, these two lines of Supreme Court precedent have created an unresolved tension in cases of alternative-legal-theory error. *Becht* v. *United States*, 403 F.3d 541, 546-48 (8th Cir. 2005); *Keating* v. *Hood*, 191 F.3d 1053, 1064 n.17 (9th Cir. 1999); *id.* at 1068 (Rymer, J., dissenting); *Quigley* v. *Vose*, 834 F.2d 14, 16 (1st Cir. 1987) (per curiam). At a minimum, this Court's precedent in this area is ambiguous. Accordingly, the state court's decision to choose the path of harmless error review was not unreasonable or contrary to Supreme Court precedent under § 2254(d)(1). See *Mitchell* v. *Esparza*, 540 U.S. at 17.

Having erred under AEDPA by finding the error to be structural and by applying its *Stromberg*-based rule, the Ninth Circuit erred as well by not applying the customary prejudice test for federal habeas cases: the relatively forgiving "substantial and injurious effect" standard set forth in *Kotteakos* v. *United States*, 328 U.S. 750, 776 (1946), adopted for habeas cases by *Brecht* v. *Abrahamson*, 507 U.S. at 637, and strongly reiterated by *Fry* v. *Pliler*, 127 S.Ct. at 2328 (federal habeas court must assess the prejudicial impact of constitutional error in a state-court criminal trial under the *Brecht* test whether or not the state appellate court recognized the error and reviewed it for harmlessness). Although the Ninth Circuit mentioned the *Brecht* test (Pet. App. 7a n.3), it did not apply it, evidently because the court considered the error to be structural error, which is not tested for prejudice. See *Arizona* v. *Fulminante*, 499 U.S. 279, 309 (1989) (structural errors "defy analysis by 'harmless-error' standards"). Because this Court's precedent does not clearly establish that the error here was structural, the error should have been reviewed for harmlessness under *Brecht*.

A. Under this Court's modern instructional error cases, the instructional error here was only trial error.

In its landmark decision in *Chapman* v. *California*, 386 U.S. 18, this Court held that constitutional error can sometimes be harmless. After *Rose* v. *Clark*, 478 U.S. at 579, stated a "strong presumption" that constitutional errors can be harmless, the Court suggested in *Arizona* v. *Fulminante*, 499 U.S. 279, which ones can be and which can never be. *Fulminante* distinguished between "trial error," *id.* at 307, and "structural defects," *id.* at 309. The former can be "quantitatively assessed" in order to determine whether the error was harmless beyond a reasonable doubt, see *id.* at 308, whereas the latter "defy analysis by 'harmless-error' standards," *id.* at 309. See *Neder* v. *United States*, 527 U.S. at 8 (structural error arises only in the "very limited class of cases" that "contain 'a defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself.'").

The Court has repeatedly found instructional errors regarding essential elements of the prosecution's proof to be trial errors subject to harmless error review. Such errors include a mandatory rebuttable presumption, *Yates* v. *Evatt*, 500 U.S. 391 (1991), *Rose* v. *Clark*, 478 U.S. 570, or a mandatory conclusive presumption, *Carella* v. *California*, 491 U.S. 263 (1989) (per curiam), that shifts the burden of proof to the defendant on an element of the offense. It is also trial error for a trial court to describe an element incorrectly, *Pope* v. *Illinois*, 481 U.S. 497, to omit an element of the charged crime, *Neder* v. *United States*, 527 U.S. 1, to give an instruction that can be called either a misdescription or an omission of an element, *California* v. *Roy*, 519 U.S. 2 (1996) (per curiam), or to fail to submit a sentencing factor to the jury. *Washington* v. *Recuenco*, 126 S.Ct. 2546 (2006).

By contrast, the Court has specifically found only one instructional error to be structural: an incorrect definition of the "beyond a reasonable doubt" standard that lowers the prosecution's burden of proof. *Sullivan* v. *Louisiana*, 508 U.S. 275 (1993). It is apparently also structural error for a trial court to instruct a jury simply to convict the defendant without considering the evidence—a directed verdict. See *Neder*, 527 U.S. at 17 n.2; *Rose*, 478 U.S. at 578; *Sparf* v. *United States*, 156 U.S. 51, 105 (1895).

Instructional error occurred in this case because three factors—(a) ambiguity in the robbery and murder instructions, (b) the trial court's confusing answers to the jury's questions, and (c) the absence of a jury finding that respondent personally inflicted great bodily injury or used a firearm—combined to make it reasonably likely that the jury applied the instructions in an unconstitutional way: convicting respondent of felony murder as an accomplice without finding, as required by state law, that he aided in the robbery before the killing. See *Estelle* v. *McGuire*, 502 U.S. 62, 72 & n.4 on 72 (1991); *Boyde* v. *California*, 494 U.S. 370, 380 (1990).[4/] As discussed below, this Court's modern approach to instructional error establishes that the error in this case was trial error only or, at the least, that the state court did not act unreasonably or contrary to this Court's

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4. The unconstitutional error at issue here is *not* the typographical mistake in the special-circumstance instruction that substituted "or" for "and" in stating some of the elements required for a special-circumstance finding. Respondent did not claim in state court that *that* instruction amounted to prejudicial error either by itself or in conjunction with the instructions on felony murder. He cannot obtain relief by making such a claim for the first time in federal court. See 28 U.S.C. § 2254; *Gray* v. *Netherland*, 518 U.S. 152, 161-62, 165 (1996); *Vasquez* v. *Hillery*, 474 U.S. 254, 260 (1986); *Rose* v. *Lundy*, 455 U.S. 509, 518 (1982). Further, such a claim would not be cognizable now because respondent also failed to raise it either in the federal district court or in his opposition to the petition for certiorari.

approach under § 2254(d)(1) in treating the error as trial error.

1. The error here was indistinguishable from the instructional errors this Court has found to be trial errors and was not comparable to those this Court has found to be structural.

a. Beginning with *Rose*, 478 U.S. 570, the Court found a series of instructional errors to be subject to harmless error analysis. Those instructional errors are indistinguishable from the error here in that none prevented the jury from making findings from which a reviewing court could determine whether the jury would have convicted under proper instructions.

In *Rose*, 478 U.S. at 580, the error impermissibly shifted the burden of proof on an element. Harmless error analysis was required because the erroneous instruction could have been "simply superfluous" in the sense that it did not necessarily prevent the jury from finding "'every fact necessary' to establish every element of the offense beyond a reasonable doubt. [Citation omitted.]" *Id.* at 581. In *Pope* v. *Illinois*, 481 U.S. 497, the erroneous instruction was arguably more serious than the one in *Rose* because it allowed the jury to convict the defendant by finding that he engaged in constitutionally protected conduct. The trial court should have instructed the jury to decide (as the Constitution required) whether a reasonable person would find serious literary, artistic, political, or scientific value in allegedly obscene material. Instead, the trial court told the jury to decide whether ordinary adults in the State of Illinois would view the material as obscene. *Id.* at 499. The instruction was unconstitutional because it allowed the jury to apply a legally erroneous theory—"a state community standard." *Id.* at 503. *Pope* found the error "comparable to" the one in *Rose* because the jurors "were not precluded from considering the question of value" (the element in

question) but were only told to do so under the wrong standard. *Pope*, 481 U.S. at 502-03. The error in this case was no more serious than the one in *Pope* (and, likewise, no more serious than the impermissible presumption in *Rose*) because, at worst, the jury used a legally erroneous standard (post-killing involvement rather than pre-killing involvement) to determine whether respondent aided and abetted felony murder.

In *Carella* v. *California*, 491 U.S. at 264-66, the error was again arguably more serious than the one in *Rose*, this time because the presumption was conclusive rather than merely rebuttable. Again, the difference did not matter. Citing *Rose* for the proposition that predicate facts could have conclusively established the element in question and, thus, could have made the erroneous instruction superfluous, the Court held that the error could be harmless. *Id.* at 266-67. Likewise here, the erroneous instruction was potentially superfluous in the same sense as the offending instructions in *Rose* and *Carella*: it did not prevent the jury from finding predicate facts that could have established aiding and abetting the robbery before the killing. For example, the jury could have based its special-circumstance finding of (at a minimum) major participation in the robbery and reckless indifference to human life on a determination that respondent was a willing and active participant in the robbery from the outset, in which case the jury would have found predicate facts establishing the missing contemporaneity element.

In *California* v. *Roy*, 519 U.S. at 3, a federal habeas case, the trial court erroneously failed to instruct the jury that it could convict the defendant as an aider and abettor only if it found that he intended to aid the confederate's crime. Noting that the error was "as easily characterized as a 'misdescription of an element' of the crime, as . . . an error of 'omission,'" and that no one claimed it to be structural error (*id.* at 6), the Court held in a per curiam opinion that

the *Brecht/Kotteakos* standard must be applied. *Id.* at 7. In this case, too, one could with equal justification characterize the error as the misdescription or omission of an element—the contemporaneity element of aiding and abetting felony murder. Substantively no more serious than the one in *Roy*, the error here, too, required standard harmless error review.

b. *Sullivan* v. *Louisiana*, 508 U.S. at 280, found an instructional error to be structural. This Court in *Neder*, 527 U.S. 1, distinguished *Sullivan* and found a different instructional error to be trial error only. *Neder* explains why the error here was not comparable to the one in *Sullivan* and was indistinguishable from the one in *Neder*.

Sullivan, 508 U.S. at 280, held that a defective reasonable doubt instruction was structural error because it produced no jury verdict of guilty beyond a reasonable doubt and, likewise, made "utterly meaningless" the harmless error inquiry into "whether the *same* verdict of guilty-beyond-a-reasonable-doubt would have been rendered absent the constitutional error. . . ." Put another way, the error left a reviewing court with "no *object*, so to speak, upon which harmless-error scrutiny can operate." *Id.* The error "vitiate[d] *all* the jury's findings." *Id.* at 281. Its "precise effects [were] unmeasurable," *id.*, its "consequences . . . necessarily unquantifiable and indeterminate. . . ." *Id.* at 282.

In *Neder*, 527 U.S. at 8, the trial court erred by failing to instruct the jury on the materiality element of perjury. Finding only trial error, *Neder* distinguished *Sullivan* because the error in *Neder* "did not 'vitiat[e] all the jury's findings'. . . ." even though it "prevent[ed] the jury from making a finding on the element of materiality." *Neder*, at 11. Here, as petitioner has conceded, there is a reasonable likelihood that the jury did not find the contemporaneity element of aiding and abetting felony murder. But the jury reached its verdict by finding the defendant guilty beyond

a reasonable doubt, and the error did not prevent the jury from making other findings beyond a reasonable doubt. Accordingly, the error here, like the one in *Neder*, did not vitiate all or, indeed, any of the jury's findings as the basis upon which a court could conduct harmless error review. As in *Neder*, and in contrast to *Sullivan*, there is an *object*—a jury verdict rendered on a proper reasonable doubt standard—upon which harmless error analysis can operate.

Neder recognized that one "strand of the reasoning in *Sullivan*" supported the argument that the omission of an element is structural error because it "prevents the jury from rendering a 'complete verdict' on every element of the offense." *Neder*, at 11. But *Neder* found that such reasoning "cannot be squared with our harmless-error cases." *Id.* Accord, *Washington* v. *Recuenco*, 125 S.Ct. at 2553. *Neder* noted that the misdescribed element in *Pope*, the conclusive presumption in *Carella*, and the omission or misdescription in *Roy* were all errors that could be said to have prevented the jury from producing a "complete verdict," yet none of those errors was structural. *Neder*, at 11-12. In this case, the reasonable likelihood that the jury failed to make the required finding of contemporaneity and, therefore, failed to return a "complete verdict" is likewise insufficient to make the error structural.

Neder went further. The defendant in that case argued that "a finding of harmless error may be made only upon a determination that the jury rested its verdict on evidence that its instructions allowed it to consider." *Id.* at 17. *Neder* rejected that argument, calling it "simply another form of the argument that a failure to instruct on any element of the crime is not subject to harmless-error analysis." *Id.* The fact that the omitted-element error "preclude[d] any consideration of evidence relevant to the omitted element," *id.* at 17-18, did not prevent a prejudice analysis. It only mandated one that was not strictly limited

to the evidence the jury considered: would the jury have convicted absent the error? *Id.* at 18. *Neder* thus established that an instructional error does not become structural simply by preventing a jury from considering some evidence. Since the error in this case did not prevent the jury from considering *any* evidence, it could only be trial error.

c. This Court's post-*Neder* cases have confirmed that error such as the one here was only trial error. In *Washington* v. *Recuenco*, 126 S.Ct. 2546, the jury found that the defendant was armed with a deadly weapon at the time he committed the crime, but the jury was not instructed to determine whether the defendant was armed with a firearm. *Id.* at 2549. At sentencing, the trial court supplied the latter finding and imposed a longer sentence than what the defendant would have received had the court limited itself to what the jury found—that the defendant committed the offense while armed with a deadly weapon that was not necessarily a firearm. *Id.* The trial court thereby violated the rule of *Apprendi* v. *New Jersey*, 530 U.S. 466, 490 (2000), that any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. *Recuenco*, at 2549.

Recuenco found the error to be indistinguishable from the one in *Neder*, and concluded, "Failure to submit a sentencing factor to the jury, like failure to submit an element to the jury, is not structural error." *Id.* at 2552-53. Although the errors in both cases failed to produce "a complete finding of guilt of the crimes for which the defendant was sentenced," *id.* at 2552, such incompleteness did not make the error structural. *Id.* at 2553. See *Mitchell* v. *Esparza*, 540 U.S. at 15-17 (not contrary to Supreme Court precedent to conduct harmless error review of state's erroneous failure to charge factual circumstance necessary for imposition of death penalty).

If harmless error analysis was appropriate in *Recuenco* and *Esparza*, then it is necessarily appropriate here. In those cases, harmless error analysis was permissible even if the jury convicted the defendant of, in effect, only a lesser offense than the one for which he was sentenced. This case presents a firmer basis for conducting harmless error analysis because the jury convicted respondent of the charged offense, murder (even though a reasonable likelihood exists that the jury misapplied the law in doing so).

In summary, the error here was neither more serious than the trial errors in *Rose*, *Pope*, *Carella*, *Roy*, *Neder*, and *Recuenco* nor remotely comparable to the structural errors of an unconstitutional definition of "beyond a reasonable doubt" (as in *Sullivan*) or a true directed verdict. Accordingly, the Court's modern cases addressing instructional error demonstrate that the error here was trial error only.

2. The error here did not meet this Court's definition of structural error.

This Court's modern harmless error cases show that an instructional error is structural only when the finding of error itself demonstrates that the error has deprived a reviewing court of the ability to determine whether the error was prejudicial. An error deprives a reviewing court of the ability to determine prejudice only in the exceedingly rare case in which the error produces a record devoid of a verdict beyond a reasonable doubt or, as in a directed verdict, a record lacking a verdict based on relevant evidence. Since the likely misapplication of law that was the error in this case did not deprive a reviewing court of the requisite record upon which harmless error analysis may be conducted, the error was not structural.

Contrary to the view of the Ninth Circuit panel, structural instructional error must be more serious than

trial error that proves to be prejudicial. See *Neder*, 527 U.S. at 13-14 (argument that instructional error is structural unless jury found facts functionally equivalent to the omitted element improperly "imports into the initial structural-error determination . . . a case-by-case approach that is more consistent with our traditional harmless-error inquiry (i.e., whether an error is harmless)."). Instead of prejudicial trial error, structural instructional error is error that is recognizable as structural because it "def[ies] analysis by 'harmless error' standards." *Arizona* v. *Fulminante*, 499 U.S. at 309; *Neder*, 527 U.S. at 7. See *Sullivan* v. *Louisiana*, 508 U.S. at 280 (structural error is error with consequences that are necessarily unquantifiable and indeterminate); *id.* at 281 (because it vitiates *all* the jury's findings, an erroneous definition of "beyond a reasonable doubt" allows reviewing court only to speculate what a reasonable jury would have done). In other words, an error is structural only when the determination that constitutional error occurred itself establishes that harmless error analysis cannot even begin.

United States v. *Gonzalez-Lopez*, 548 U.S. 140, 126 S.Ct. 2557 (2006), demonstrates how a reviewing court's determination of error includes the basis for an assessment of whether the error was structural. The defendant in *Gonzalez-Lopez* was deprived of his constitutional right to counsel of choice. *Id.* at 2563. The Court held that the error met the definition of structural error from *Sullivan*, 508 U.S. at 282: an error "with consequences that are necessarily unquantifiable and indeterminate. . . ." *Gonzalez-Lopez*, at 2564. The Court explained, "It is impossible to know what different choices the rejected counsel would have made, and then to quantify the impact of those different choices on the outcome of the proceedings." *Id.* at 2565. The Court did not, because it could not, actually assess the impact of the error on the trial. *Id.* at 2564 n.4. Rather, it recognized from a

statement of the error itself that a court could not even begin to make such an assessment.

The constitutional error at issue in this case occurred because of the reasonable likelihood that the jury convicted respondent of felony murder under an aiding and abetting theory without making the required finding that respondent aided and abetted the underlying felony of robbery before the killing. A statement of the error thus establishes that it did not produce a conviction based either on less than a beyond-a-reasonable-doubt standard of proof or on no relevant evidence. Likewise, the consequences of the error were not *necessarily* unquantifiable and indeterminate. For the same reason, the error allowed a reviewing court to conduct a prejudice analysis and was only trial error.

3. An error cannot become structural simply because it can be characterized as "alternative legal theory error."

Because the error here stemmed from instructions that provided the jury with an erroneous alternative theory on which to convict, it could fairly be called alternative-legal-theory error. But such a label has no legal significance. Characterizing the error as alternative-legal-theory error does not make it any more serious than "single legal theory error"—submitting to the jury a single theory of guilt tainted by unconstitutional instructional error.

By definition, alternative-legal-theory error allows the jury to convict on either an incorrect theory or a correct one, whereas single-legal-theory error allows the jury to convict with only an incorrect theory. Giving the jury a right way in addition to a wrong way to convict may be a less serious error than giving the jury only a wrong way. For example, if the trial court in *Neder* had instructed the jury that it could convict the defendant either by finding all the elements of the crime, including materiality, or by

finding all the elements except materiality, such an alternative-legal-theory error could not possibly have been more serious than the single-legal-theory error that actually occurred: the simple omission of the materiality element. Likewise, if the trial court in this case had instructed the jury only with the flawed aiding-and-abetting theory, as opposed to that theory and a correct direct perpetrator theory, the former approach—single-legal-theory error—could not have been more serious than the latter, alternative-legal-theory error. And, since single-legal-theory error is commonly and presumptively trial error, as it was in *Neder*, it follows that an error does not become structural simply because it can be characterized as alternative-legal-theory error. See *Quigley* v. *Vose*, 834 F.2d at 16 (per curiam) ("Once the camouflage is stripped away, petitioner's assertion reduces to the strange claim that, because the jury here received both a 'good' charge and a 'bad' charge on the issue, the error was somehow more pernicious than in *Rose*—where the *only* charge on the critical issue was a mistaken one. That assertion cannot possibly be right, so it is plainly wrong."); accord, *Becht* v. *United States*, 403 F.3d at 548, see also *United States* v. *Holly*, 483 F.3d 1298, 1304-07 (10th Cir. 2007) (alternative-legal-theory error subject to harmless error review).

In sum, calling an instructional error "alternative legal theory error" does nothing to rebut the strong presumption that the error could be harmless. *Rose*, 478 U.S. at 579. What matters is the substance of the error, not its label. See *Roy*, 519 U.S. at 5 (immaterial whether error called misdescription or omission of an element). As shown above, the error here was substantively indistinguishable from errors this Court has found to be trial errors; it was not comparable to errors this Court has found to be structural; and it did not meet the definition of structural error. It was trial error only.

B. *Stromberg* is inconsistent with the Court's modern harmless error cases.

Given this Court's modern harmless error jurisprudence, the Ninth Circuit's citation in this case to its *Lara* v. *Ryan* rule—a rule it derived from *Stromberg* v. *California*, 283 U.S. at 363—does not qualify as the "clearly established Federal law" that a federal habeas court must use to judge a state court decision under 28 U.S.C. § 2254(d).

In *Stromberg*, the trial court instructed the jury that it could convict by finding that the defendant displayed a red flag for any of three purposes. The first one was impermissible to criminalize because it included constitutionally protected conduct. *Id.* at 369. Because of "the manner in which the case was sent to the jury," including the prosecutor's argument to the jury that it "could convict the appellant under the first clause alone, without regard to the other clauses," this Court reversed, finding it "impossible to say under which clause of the statute the conviction was obtained. . . ." *Id.* at 368.

Stromberg cannot be reconciled with this Court's modern harmless error cases. According to *Stromberg*, reversal is required when two conditions exist: (1) one of several possible grounds for conviction is constitutionally impermissible and (2) the verdict "may have rested" on the impermissible ground. Under this Court's modern cases, those two conditions are no longer sufficient to require reversal. That is, a jury's possible reliance on a legally impermissible theory is no more than constitutional *error*, requiring no relief if a reviewing court determines that the jury would have reached the same verdict under proper instructions. Only structural error is exempt from the latter principle. But, as shown previously, "alternative legal theory error" is not necessarily structural.

1. The concept of prejudice from constitutional instructional error has fundamentally changed from any concept of prejudice that might be attributed to *Stromberg*.

After *Stromberg*, this Court relied on that case to reverse convictions in cases in which the jury might have relied on a constitutionally defective theory to convict. E.g., *Bachellar* v. *Maryland*, 397 U.S. 564, 570-71 (1970); *Williams* v. *North Carolina*, 317 U.S. 287, 292 (1942). This Court also relied on *Stromberg* in cases in which the jury might have relied on an erroneous legal principle the Court did not expressly find to be unconstitutional. E.g., *Yates* v. *United States*, 354 U.S. 298, 312 (1957). See *Bollenbach* v. *United States*, 326 U.S. 607, 614-15 (1946) (not citing *Stromberg*; reversing conviction based on legally erroneous theory; citing right to jury trial as precluding supposition that Congress intended to allow appellate court to find guilt).

In holding that constitutional error could be harmless, however, this Court in *Chapman* v. *California*, 386 U.S. 18, necessarily changed the *Stromberg* rule. In *Rose* v. *Clark*, 478 U.S. at 572, 582, 584, the Court held for the first time that instructional error of constitutional dimensions could be found harmless under *Chapman*. However, *Rose* did not clearly state how a *Chapman* analysis would differ from a reviewing court's previous focus on whether the jury *could* have relied on the erroneous instruction. See *id.* at 582 n.11 (formulating the harmless error question as "what is to be done about a trial error that, in theory, may have altered the basis on which the jury decided the case, but in practice clearly had no effect on the outcome?"). In *Neder*, if not before, the prejudice test crystallized into what a properly instructed jury *would* have done: "Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?" *Neder*, 527 U.S. at 18.

See *Sullivan*, 508 U.S. at 280 (referring to the harmless error inquiry as "whether the *same* verdict of guilty-beyond-a-reasonable-doubt would have been rendered absent the constitutional error. . . .").

Thus, from the time of *Stromberg* to the modern harmless error era, the prejudice question evolved from what the jury *could* have done *with* the erroneous instruction to what the jury *would* have done *without* it. The *Stromberg* rule is inconsistent if not irreconcilable with the Court's modern harmless error cases because *Stromberg* requires reversal without regard to what the jury would have done had it been properly instructed.

The modern distinction between structural and trial error further demonstrates the demise of *Stromberg*. At the time of *Stromberg*, that distinction did not exist, either nominally or functionally. *All* federal constitutional instructional errors were treated as structural because a reviewing court never asked, as modern courts do, whether the result would have been the same absent the error. Reviewing courts reversed under *Stromberg* by finding something less than modern instructional error: a mere possibility, as opposed to a "reasonable likelihood," that the jury misapplied the law by relying on the erroneous aspect of the challenged instruction. Thus, *Stromberg* is also inconsistent with the modern rule that in most cases—indeed, the overwhelming majority—an instructional error requires no relief if the jury would still have convicted had the error not occurred. Likewise, the California Supreme Court did not violate "clearly established" law by applying the modern rule, rather than *Stromberg*.

2. This Court has never indicated that *Stromberg* can be reconciled with the Court's modern harmless error rules, and *Pope* v. *Illinois* shows that it cannot be.

a. After first holding in *Rose* that constitutional instructional error can be harmless, the Court has rarely referred to *Stromberg*'s rule of alternative-legal-theory error. None of those references validates *Stromberg*'s notion that a conviction must be reversed if a jury may have used a constitutionally erroneous legal theory to reach it.

Mills v. *Maryland*, 486 U.S. 367, 375 (1988), considered how the jury in the penalty phase of a capital trial interpreted its instructions and verdict form. The defendant argued that the jury adopted an unconstitutional interpretation: that the jury could not consider mitigating evidence before first unanimously agreeing that the evidence constituted a mitigating circumstance. *Id.* at 375, 376. Citing *Stromberg*'s rule of alternative-legal-theory error and other authority, *Mills* formulated the issue this way: "Unless we can rule out the substantial possibility that the jury may have rested its verdict on the 'improper' ground, we must remand for resentencing. [Footnote omitted.]" *Id.* at 377. *Mills* proceeded to explain: "[W]e cannot conclude, with any degree of certainty, that the jury did not adopt petitioner's interpretation of the instructions and verdict form." *Id.* at 377-78. *Mills* invoked the *Stromberg* rule that alternative-legal-theory error requires reversal if a reviewing court cannot know whether the jury relied on a legally impermissible theory.

But *Mills* is inapposite because it used the alternate-legal-theory rule in a different context from the one in which *Stromberg* used it. Whereas *Stromberg* focused on whether to reverse a conviction if the jury might have misapplied the law, *Mills* used the *Stromberg* rule to decide whether the jury *had* misapplied the law—not what to do

if it had. Although *Mills* found that the error required resentencing, *id.* at 385, it did not explain why. Nor did it address *Rose* or *Pope*. Instead, *Mills* used *Stromberg*'s "prejudice" standard to define instructional error without considering prejudice itself. Accordingly, *Mills* is best interpreted as using *Stromberg* to establish the degree to which a reviewing court must be satisfied that a jury misinterpreted an instruction before the court may conclude that unconstitutional instructional error occurred.

An analysis of *Boyde* v. *California*, 494 U.S. 370, solidifies this understanding of *Mills*'s use of *Stromberg*. *Boyde* observed that the instruction at issue in that case differed from the one in *Stromberg* in that the *Stromberg* instruction was "concededly erroneous" and gave rise to the "likely possibilit[y]" that the jury relied on it to convict. *Boyde*, 494 U.S. at 380. *Boyde* then explained that *Stromberg* was not inconsistent with a rule that the "reasonable likelihood" test is the "proper inquiry" when "the instruction is ambiguous and therefore subject to an erroneous interpretation." *Id.* Accordingly, *Boyde* suggested that the "reasonable likelihood" test is satisfied when a "concededly erroneous" instruction creates a "likely possibilit[y]" that the jury misapplied the law. *Boyde* thereby confined *Stromberg* to the realm of error, as opposed to prejudice, even more clearly than *Mills* did.

This Court next mentioned *Stromberg*'s rule of alternative-legal-theory error in *Griffin* v. *United States*, 502 U.S. 46 (1991), but again only to distinguish it. *Griffin* found the *Stromberg* rule inapplicable to a case in which a jury is given two factual theories on which to convict and only one of them is supported by substantial evidence. *Id.* at 56. Finally, the Court alluded to the *Stromberg* rule in *Sochor* v. *Florida*, 504 U.S. 527, 538 (1992), but only in reaffirming *Griffin* and thus implicitly finding *Stromberg* inapplicable yet again.

b. This Court has not only treated *Stromberg* as a rule

for determining the existence of error, rather than as a rule of reversal, but has never attempted to reconcile *Stromberg* with the *Rose* line of cases. The Court has not mentioned the *Stromberg* rule after *Neder* crystallized the prejudice test for instructional error as whether the jury would have convicted had it been properly instructed.

Pope v. *Illinois*, 481 U.S. 497, demonstrates most clearly the incompatibility of *Stromberg* with modern instructional error cases. In *Stromberg* the jury could have relied on an instructional theory permitting conviction based upon the defendant's constitutionally protected speech. In *Pope* the jury indisputably *did* rely on such a theory. The jury was given only one legal theory on which to convict—a theory that defined pornography so broadly that it included constitutionally protected speech. *Id.* at 500-01. Yet *Pope*, without mentioning *Stromberg*, held that the error could be harmless. *Id.* at 502-03. If *Pope* is correct—and the Court's favorable references to it leave no doubt that it is, see, *e.g.*, *Neder*, 527 U.S. at 11-12, 13-14—*Stromberg* cannot be. At a minimum, *Stromberg* cannot be "clearly established" law trumping *Pope*.

3. The Ninth Circuit's variant on *Stromberg* is inconsistent with this Court's modern harmless error approach.

The Ninth Circuit's rule differs in its precise wording from the *Stromberg* rule, but the difference is insignificant, especially for purposes of AEDPA. Under *Stromberg*, alternative-legal-theory error requires reversal if a reviewing court finds it impossible to tell whether the jury relied on an unconstitutional or legally erroneous theory to convict. Under the Ninth Circuit's rule, alternative-legal-theory error requires reversal if a reviewing court cannot be "absolutely certain" that the jury did not rely on a legally incorrect theory. *Lara*, 455 F.3d at 1085. As can be seen simply from stating the two rules, the Ninth Circuit's

version is at least as stringent as *Stromberg*'s. As shown in the previous section, the *Stromberg* rule is inconsistent with this Court's modern harmless error rules because it is too stringent. Necessarily, then, the Ninth Circuit's rule is inconsistent with this Court's modern harmless error cases as well.

A review of the genesis of the Ninth Circuit's rule compels the same conclusion. The Ninth Circuit's "absolutely certain" variant of the *Stromberg* rule derives from the Ninth Circuit's reading of *Zant* v. *Stephens*, 462 U.S. 862 (1983), even though the term "absolutely certain" does not appear in *Zant*. See *Ficklin* v. *Hatcher*, 177 F.3d 1147, 1149-50 (9th Cir. 1999). *Zant* considered whether the defendant's death-penalty judgment had to be vacated because the state supreme court subsequently invalidated one of three statutory aggravating circumstances found by the jury. *Zant*, at 864. Considering the *Stromberg* line of cases, *Zant* noted that reversal was required in those cases if the record "left the reviewing court *uncertain* as to the actual ground on which the jury's decision rested," *id.* at 881 (emphasis added), or if the verdict may have rested on constitutionally protected conduct. *Id.* at 883. Neither circumstance applied in *Zant* because the jury did not rely entirely on the invalid aggravating factor, *id.* at 881, and none of the aggravating circumstances involved constitutionally protected conduct. *Id.* at 884.

Ficklin upheld a conviction despite an instruction on an impermissible legal theory because the court could "tell *with certainty* from the jury instructions that the jury rested its verdict on a ground that did not implicate petitioner's constitutional right. . . ." *Ficklin*, 177 F.3d at 1151 (emphasis added). Having thus expanded *Zant*'s colloquial use of the word "uncertain," the Ninth Circuit proceeded to expand it further. *Keating* v. *Hood*, 191 F.3d at 1063, turned *Ficklin*'s "with certainty" into "absolutely certain," and *Lara* v. *Ryan*, 455 F.3d at 1085, repeated that

language.

Apart from its dubious paraphrasing of *Zant*, the Ninth Circuit incorrectly interpreted *Zant* as suggesting a modification of the *Stromberg* rule. *Zant* held merely that the *Stromberg* rule does not apply when a jury has not relied entirely on an invalid theory. Even if *Zant* could be said to have rested on *Stromberg*, it still would remain unclear how a pre-*Rose* case such as *Zant* is any better authority for the post-*Rose* survival of *Stromberg* than *Stromberg* itself.

In *Lara*, 455 F.3d at 1086, the Ninth Circuit attempted to reconcile its *Stromberg*-based rule with the *Rose* line of cases. But it did so only in conclusory fashion:

> . . . the trial court did not merely omit or misstate an element of the charged offense. Rather, its error was structural, because it enabled the jury to deliver a general verdict that potentially rested on different *theories of guilt*, at least one of which was constitutionally invalid. *See Sandstrom*, 442 U.S. at 526. . . . As such, Lara's claim arises from the "very limited class of cases" in which a structural error has occurred. *Neder*, 527 U.S. at 8. . . .

Instead of explaining why alternative-legal-theory error is structural, *Lara* simply asserted that it is. But as explained previously, an instructional error does not become structural simply because one can call it "alternative legal theory error." When the substance of the error is no more serious than the presumed elements in *Rose* or *Carella*, the misdescribed elements in *Pope* or *Roy*, or the omitted elements in *Neder*, *Recuenco*, or *Esparza*, the error can be trial error only.

Even if mere Circuit authority could amount to "clearly established Federal law" under AEDPA—and it cannot, see *Carey* v. *Musladin*, 549 U.S. 70, 127 S.Ct. 649, 653-54 (2006)—the Ninth Circuit's variant on the *Stromberg* rule suffers from the same infirmities as the *Stromberg* rule

itself.

4. Because alternative-legal-theory error is an unbounded principle, the Ninth Circuit's *Stromberg*-based rule subverts this Court's modern harmless error principles.

The same quality that makes alternative-legal-theory error ordinarily indistinguishable from other types of instructional trial error makes the Ninth Circuit's *Stromberg*-based rule very dangerous. That rule would render incoherent this Court's doctrinal definitions and would create a template for making structural error out of what is only trial error.

Under this Court's jurisprudence, instructional error requires a reasonable likelihood that the jury misapplied the law, and structural error cannot be harmless. Under the Ninth Circuit's *Stromberg*-based rule, one form of structural error (alternative-legal-theory error) *can* be harmless but only when, in effect, no instructional error occurred in the first place. That is, alternative-legal-theory error in the Ninth Circuit does not require reversal if a reviewing court is absolutely certain that the jury did not rely on the erroneous theory to convict. But, if the jury did not rely on the erroneous theory, the jury did not misapply the law. And if the jury did not misapply the law, there is no constitutional error at all, given the *Boyde/McGuire* definition of error. Therefore, in the Ninth Circuit, alternative-legal-theory error is structural error that not only can be harmless but may not even be error. It would be difficult to confuse this Court's harmless error rules more thoroughly.

Apart from the doctrinal anarchy it creates, the Ninth Circuit's rule is a prescription for reversing convictions in all manner of instructional errors. Many if not most crimes are defined with alternative legal theories. Under the Ninth Circuit's rule, any error in the instructions on one

theory can be portrayed as alternative-legal-theory error and, as such, structural. As demonstrated by *Lara*, *Keating*, *Ficklin*, and this case, alternative-legal-theory error is a recurring phenomenon in the Ninth Circuit. See also *Martinez* v. *Garcia*, 379 F.3d 1034, 1040-41 (9th Cir. 2004); *Suniga* v. *Bunnell*, 998 F.2d 664 (9th Cir. 1993).

Just as it would greatly increase the number of structural errors, the Ninth Circuit's invocation of its *Stromberg*-based rule in 28 U.S.C. § 2254 cases undermines this Court's command in *Fry* v. *Pliler* that federal habeas courts normally must apply the *Brecht* harmless error test to constitutional violations. Since many instructional errors can easily be portrayed as alternative-legal-theory error—and therefore structural under the Ninth Circuit's approach—the Ninth Circuit's rule jettisons *Brecht*'s deferential review of state court findings of harmless instructional error and replaces it with (1) an unguided de novo determination of whether an instruction can be characterized as alternative-legal-theory error and, if such a finding is made, (2) a "structural error" determination of whether the jury could have relied on the assertedly erroneous instruction.

The Ninth Circuit's rule is equally damaging to AEDPA's requirement of deferential review of state court adjudications of federal claims. AEDPA requires habeas courts to affirm state convictions unless the state court acted contrary to or unreasonably applied clearly established Supreme Court precedent. If the Ninth Circuit rule were to survive, *Stromberg*, not *Chapman*, could be deemed clearly established Supreme Court precedent whenever an error can be called alternative-legal-theory error. Thus, state courts would face a difficult choice when adjudicating such claims on direct review. If the state court follows the Ninth Circuit's rule, it will have to reverse unless it finds, in effect, no error—i.e., no jury reliance on the improper alternative theory. If the state court does not

follow the Ninth Circuit's rule and applies only *Chapman*, it will act contrary to what the Ninth Circuit considers to be the clearly established rule: the perceived mandate of *Stromberg* that alternative-legal-theory error is structural. At that point, the state court adjudication will lose AEDPA's deferential review in federal court. By classifying alternative-legal-theory error as structural error, the Ninth Circuit's rule may force state courts either to forgo *Chapman* analysis on direct appeal or forfeit AEDPA deference if they do not. Lacking any principled limits or doctrinal coherence, the Ninth Circuit's rule of alternative-legal-theory error threatens to undo both this Court's harmless error work from the last twenty years and the deferential review federal habeas courts are required to accord state court judgments by AEDPA and *Brecht* v. *Abrahamson*.

* * * * * * * *

Because the error here was trial error only, the California Supreme Court did not act contrary to this Court's clearly established precedent in testing it for prejudice. The case must be remanded to the Ninth Circuit for application of the *Brecht* harmless error test: whether the error had a substantial and injurious effect on the verdict.

CONCLUSION

The judgment of the Ninth Circuit Court of Appeals should be reversed.

Dated: May 8, 2008

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